SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC., PETITIONER,

vs.

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF OLIVER A. OLSON, CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1933

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 53346.

In the Matter of Oliver A. Olson Co., Inc., Bankrupt

Proof of Claim

United States of America,
Southern District of New York, ss:

In the above district, in the County of New York, State of New York; on the date hereinafter set forth, came Samuel Levy and makes oath and says:

I am an officer of Manhattan Properties, Inc., a corporation duly organized under the laws of the State of New York. I reside in the Borough of Manhattan, City of New York. I am Treasurer of said corporation. The seal affixed hereto is the seal of said corporation and was so affixed by order of its Board of Directors and I have signed my name hereto by like order. Said corporation is the claimant.

The above-named bankrupt was at the time of the filing of the petition in bankruptcy herein and still is justly and truly indebted to the claimant in the sum of $26,558.93. The consideration of said debt is as follows: On or about De-
[fol. 2] cember 20, 1927, by a certain written agreement, one W. Stafford Reid, the then owner in fee of the premises commonly known as No. 907 Madison Avenue, as landlord, let unto the bankrupt and the said bankrupt hired from the said landlord, all those premises described as all of the store and the rear portion of the basement, as then divided and partitioned off and the parlor floor of the building situate in the Borough of Manhattan, City of New York, and known as No. 907 Madison Avenue, for the term of nine years eight months beginning at noon on the 1st day of February, 1928, and ending at 10 A. M. on the 1st day of October, 1937, at the yearly rent of $9,000.00 for the period to October 1, 1930, the yearly rent of $10,000 for the period to October 1, 1934, and the yearly rent of $11,000 for the

period to October 1, 1937, in equal monthly payments on the 1st day of each month in advance during said term. That said bankrupt entered into the possession of said demised premises pursuant to said written agreement.

That heretofore and on or about December 28, 1928, the aforedescribed premises commonly known as No. 907 Madison Avenue, were duly conveyed to Manhattan Properties, Inc., the above-named claimant, and the aforedescribed written agreement dated December 20, 1927, and the unexpired term thereof and the rent due and to become due thereunder, was duly transferred, assigned and set over unto said claimant, and that said bankrupt as tenant, duly attorned to said claimant as landlord.

That said bankrupt has failed to pay the rent for the months of February and March, 1932, which became due on [fol. 3] the 1st days of each respective month, each in the amount of $833.34, making a total sum due for rent for the months of February and March, 1932, in the amount of $1,666.68, except that the sum of $107.75 was received from the receiver for use and occupation, credit for which is hereby given.

That by the filing of the said petition in bankruptcy and the adjudication of the bankrupt as such, the bankrupt has breached his said written agreement and that the bankrupt is therefore indebted to the claimant in the sum of $25,000 as and for damages for said anticipatory breach of the said written agreement above referred to. That said sum of $25,000 damages is computed as follows: The total rent reserved under the terms of the said written agreement for the balance of the unexpired term, to-wit, five and one-half years, is the sum of $58,000. That the present rental value of said unexpired term is the sum of $33,000. The bankrupt is therefore indebted to the claimant in the sum of $25,000, representing the difference between such rent reserved and the rental value of the unexpired term, as aforesaid.

That the bankrupt is therefore indebted to the claimant in the total sum of $26,558.93.

That no part thereof has been paid.

That there are no offsets or counterclaims thereto. That the claimant has not, nor has any person for or on behalf of the claimant, to deponent's knowledge or belief, had or received, for the use or benefit of the claimant, any security

for said debt. That no judgment has been rendered therefor or for any part thereof. That no note or other evidence [fol. 4] of said debt has been received except as aforesaid.

Manhattan Properties, Inc., by Samuel Levy, Treasurer, 295 Fifth Ave., N. Y. C. (Seal.)

Subscribed, sworn to and acknowledged before me this 16th day of September, 1932, said subscriber being known to me as the person described in and who signed, swore to and acknowledged the above instrument. Sophie Goldenberg, Commissioner of Deeds. N. Y. Co. Cl'k's No. 82, Reg. No. 30 G 4. Bronx Co. Cl'k's No. 11, Reg. No. 34 G 11. Kings Co. Cl'k's No. 131, Reg. No. 4024. Commission expires March 29, 1934.

[fol. 5] AGREEMENT, DATED DECEMBER 20, 1927, ANNEXED TO PROOF OF CLAIM

This Indenture, made the Twentieth day of December, one thousand nine hundred and twenty-seven, between W. Stafford Reid, residing at 50 Vanderbilt Avenue, hereinafter called "Landlord", party of the first part, and Oliver A. Olson Company, Inc., a corporation organized under the laws of the State of New York, having its principal place of business at Numbers 2220-2226 Broadway, Borough of Manhattan, City of New York, hereinafter called "Tenant", party of the second part,

Witnesseth, that the Landlord has let unto the Tenant and the Tenant has hired from the Landlord all of the Store and the Rear Portion of the Basement, as now divided and partitioned off, and the Parlor Floor of the Building situate in the Borough of Manhattan, City of New York, and known as Number Nine Hundred and Seven (907) Madison Avenue, for the term of nine years, eight months, beginning at noon on the first day of February, 1928 and ending at 10 A. M. on the first day of October 1937, unless sooner terminated as hereinafter provided, the Tenant paying therefor unto the Landlord the yearly rate of nine thousand (9,000) dollars for the period to October 1, 1930, the yearly rate of ten thousand (10,000) dollars for the period to October 1, 1934, & the yearly rate of

eleven thousand (11,000) dollars for the period to October 1, 1937, as follows: $2,250 on the execution of this lease for the period to May 1st, 1928, and thereafter in equal monthly payments, to wit: on the first day of each month in advance in each and every year of the said term. [fol. 6] And the Tenant, for the Tenant and the Tenant's legal representatives and assigns, covenants and agrees with the Landlord, as follows:

First. That the Tenant will pay the said rent promptly when due.

Second. That the Tenant will also pay all charges assessed or imposed during said term upon the said premises for water as the same become due, and if not so paid, the Landlord may pay the same, and the amount so paid shall be considered as additional rent of said premises and payable forthwith.

Third. That the Tenant will not use, nor permit to be used, any part of the demised premises for any business or purpose other than the sale of furniture, and any and all articles of merchandise usually sold in first class department stores, the agreement by the Tenant as to the use of said premises being an inducement to the Landlord to grant this lease; that the Tenant will not assign or mortgage this lease, nor underlet any part of the said premises, nor use the roof of said building, obstruct the lights or skylights thereof, injure or disfigure the said building in any way or make any alterations therein, nor allow the same to be done, without first obtaining the written consent of the Landlord, nor permit to be displayed upon any part of said premises the sign of any real estate broker, or any other sign thereon except of a kind, size and style and in a location first approved of by the Landlord. If, and when, such consent shall be given, it shall not be construed to vest in the said Tenant any right in the exterior walls of said premises or the use thereof. The [fol. 7] Landlord also reserves the right to place upon the top or roof of said premises, or on the side or exterior walls thereof, any electric or other sign or signs for advertising purposes, and such rights shall belong solely and exclusively to the Landlord.

Fourth. That the Tenant during said term will at the Tenant's own cost and expense make all repairs to the

interior of said premises, and the appurtenances thereof, necessary to preserve them in good order and condition, except any repairs necessary in consequence of damage by fire, which said repairs shall be equal in quality and workmanship to the original work in said building, and that the Tenant, at the Tenant's own cost and expense, will replace all cracked and broken glass in any doors, windows, skylights and vaults of said premises, and will comply with and fulfill all laws, ordinances and requirements of all Municipal, State and Federal authorities, and all requirements or recommendations of the New York Fire Insurance Exchange or the New York Board of Fire Underwriters, applicable to said premises. If the Tenant fail to comply with any one or all of the provisions of this covenant, the Landlord is hereby authorized to comply therewith and to charge the cost thereof to the Tenant, and the amount so expended shall be considered as additional rent of said premises and collectible as such. Tenant shall not be obliged to make any change in the front of said building.

Fifth. That the Landlord shall not be liable for any damage or injury sustained by the Tenant or other person resulting from leakage of the roof or skylight or from breakage, leakage or obstruction of water, steam, soil or [fol. 8] gas pipes or fixtures or from any overflow, nor from electric wires, nor from carelessness, negligence or improper conduct on the part of any agent or employe; but if the Landlord shall neglect to repair the said roof or skylight within a reasonable time after a written notice of necessity for such repairs shall have been given, then the Tenant may cause the said roof or skylights to be repaired, and deduct the reasonable cost of such repairs from the rent of said premises.

Sixth. That the Tenant will allow the Landlord or the Landlord's agent at all times during usual business hours, or at any time in an emergency, to enter any part of the said premises for the purpose of inspection or for making repairs, alterations or improvements that may be deemed necessary or desirable by the Landlord or the Landlord's agents, or to comply with any violations against said premises or the building of which said premises form a part, or for showing the premises to any parties who may wish to

buy or lease the same; and six months next preceding the expiration of said term, will allow the usual notice of "To Let," and at any time during said term, the usual notice of "For Sale," to be placed upon the exterior walls or doorways of said demised premises and remain thereon without hindrance or molestation.

Seventh. That any notice to or demand upon the Tenant hereunder shall be sufficient if left on said premises or sent by ordinary or registered mail addressed to the Tenant at said premises.

Eighth. If the Tenant make default in the performance of any covenant herein contained, except the covenant for [fol. 9] the payment of rent and additional rent, the Landlord may immediately, or at any time thereafter, without notice, comply with the same for account of the Tenant.

Ninth. If a notice of mechanic's lien be filed against the demised premises or against premises of which the demised premises are part, for or purporting to be for labor or material furnished or alleged to have been furnished or to be furnished to or for the Tenant at the demised premises, or to or for some contractor hired by the Tenant, the Tenant will immediately remove the same, and if the Tenant fail to do so within fifteen days, the Landlord may, at the Landlord's option, either pay the same or cause the same to be removed at the Tenant's expense, and the amount of such payment or expense, and any expense of the Landlord in any lawsuit relating to such mechanic's lien, shall be deemed to be "additional rent" for the demised premises and shall thereupon become immediately due to the Landlord from the Tenant.

Tenth. The receipt by the Landlord of any installment of the regular stipulated rent hereunder or of any of said "additional rent" shall not be a waiver of any other "additional rent" then due. The Landlord shall have the same remedies and rights for the non-payment of any "additional rent" as the Landlord has for the non-payment of any of the regular rent first above specified. The failure of the Landlord to insist, in any one or more instances, upon a strict performance of any of the covenants of this lease, or to exercise any option herein contained, shall not be construed as a waiver or a relinquish-

ment for the future of such covenant or option, but the [fol. 10] same shall continue and remain in full force and effect. The receipt by the Landlord of rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach and no waiver by the Landlord of any provision hereof shall be deemed to have been made unless expressed in writing and signed by the Landlord or the Landlord's duly authorized agent.

Eleventh. It is agreed that no employe of the Landlord or of the Landlord's agent has or shall hereafter have any power or authority to modify in any respect the terms of this lease, or to terminate the same, or to enter into any agreement for the Landlord in any way affecting the same, unless such authority shall be given by said Landlord or said Landlord's agent to such employe in writing and a copy thereof delivered to the Tenant; and it is further understood and agreed that no employe of the Landlord or of the Landlord's agent shall have any power to accept the keys of said premises prior to the termination of the lease, and that a delivery of keys to any employe of the Landlord or of the Landlord's agent shall not operate in any way as a termination of the lease or a surrender of the premises. In the event of the Tenant at any time desiring to have the Landlord sublet the premises for the Tenant's account, the Landlord or the Landlord's agent is authorized to receive said keys for such purpose without releasing the Tenant from any of the Tenant's obligations under this lease. If this lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than the Tenant, the Landlord may collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved, and no such collection shall be deemed a waiver of the cove- [fol. 11] nant herein against assignment and underletting, or the acceptance of the assignee, under-tenant or occupant as tenant, or a release of the Tenant from the further performance by the Tenant of the covenants herein contained on the part of the Tenant.

Twelfth. If there be any agreement between the Landlord and Tenant providing for the cancellation of this lease upon certain provisions or contingencies, and also an agreement for the renewal hereof at the expiration of the

term first above mentioned, the right to such renewal or the execution of a renewal agreement between the Landlord and Tenant prior to the expiration of such first mentioned term shall not be considered an extension thereof or a vested right in the Tenant to such further term, so as to prevent the Landlord from cancelling this lease and any such extension thereof during the remainder of the original term hereby granted; such privilege, if and when so exercised by the Landlord, shall cancel and terminate this lease and any such renewal or extension previously entered into between said Landlord and Tenant or the right of Tenant to any such renewal; any right herein contained on the part of the Landlord to cancel this lease shall continue during any extension or renewal hereof; any option on the part of the Tenant herein contained for an extension or renewal hereof shall not be deemed to give the Tenant any option for a further extension beyond the first renewal or extended term.

Thirteenth. The Landlord agrees to supply steam for heating said premises when necessary. Such steam shall be supplied on week days (legal holidays excepted) from [fol. 12] 8:00 A. M. to 10:00 P. M. If it becomes necessary or desirable to stop any of the machinery, apparatus, and appliances in said building by reason of accident or for the purpose of repair, alteration or improvement, or because of the inability of the Landlord to obtain fuel or power, said Landlord shall have the right to discontinue the service so long as said Landlord deems necessary or desirable for that purpose, and no claim for compensation or damages shall be made by the said Tenant, and the said Tenant hereby waives all claims for compensation and damages by reason thereof or inconvenience arising from said interruption of service. The Landlord shall not, in any event, be under any obligation to supply heat in the demised premises or the building in which said premises are located in any space beneath the level of the adjoining street.

Fourteenth. If the premises hereby rented be an entire building or a ground floor, the Tenant will at all times keep the sidewalk and gutter in front of said premises clean and free of ice and snow.

Fifteenth. If there be plate glass in said premises, the Tenant will, during the term of this lease, insure such

plate glass in the name and for the benefit of the Landlord, and pay the premium therefor, and *that* the policy for such insurance shall be forwarded by the Tenant to the Landlord, or the latter's agent, before the date of the commencement of this lease, and the Landlord, failing so to receive such policy, may insure said plate glass, the premium for which the Tenant hereby agrees to pay on demand.

[fol. 13] Sixteenth. If, through no fault or negligence of the Tenant, the said leased premises shall be partially damaged by fire or other casualty, the same shall be repaired with all reasonable speed at the expense of the Landlord, and if the damage be so extensive as to render the said premises untenantable or partially so, the rent shall be apportioned in proportion to the part of the premises that are still usable; but if the premises or the building of which the premises are a part shall be destroyed or damaged by fire or otherwise to such an extent as to render it necessary to rebuild the same, the rent shall be paid up to the time of such damage, and from then and thenceforth this lease and every renewal or extension thereof and the estate hereby granted shall cease and be cancelled.

Seventeenth. It is further convenanted and agreed that, if the whole or any part of said premises shall be taken by any City, County or State authority, or other authority, for any public purpose, then, from the day when possession of the part so taken shall be required and entered upon for such public purpose, this lease, and every extension thereof, and the estate hereby granted, shall cease, and become null, void and cancelled, and the rent shall be paid up to that date; and that if, by any such authority or by title paramount, the possession or use of any portion of or appurtenances to said building, such as vaults, show windows, stoops, porches, projections or any other thing or privilege, outside of the boundaries of the land owned by the Landlord, shall be discontinued, such discontinuance shall in no way affect the liability of the Tenant to pay the full rent reserved and to perform all of the other covenants, as herein or in any other lease or agreement with the [fol. 14] Landlord agreed to be paid, kept and performed

by the Tenant; and it is further covenanted and agreed that this lease shall be subordinate to any mortgage or mortgages which shall at any time be placed upon said premises or any part thereof, not exceeding in amount in the aggregate eighty per cent (80%) of the sales price in the event of a sale or eighty per cent (80%) of the value of the property containing the demised premises as fixed and determined by the appraisal of a reputable real estate appraiser who shall be a member of the Real Estate Board of New York, and that in the event of Landlord or any subsequent owner of the property desiring to place such mortgage or mortgages upon the property, tenant will sign, seal and deliver a consent and agreement in writing subordinating this lease to the lien of such mortgage or mortgages in form as may be required by the parties making the loan.

Tenant also covenants and agrees that he will at all times save landlord harmless of and from any claim, liability, loss, damage, suits, costs and expense arising under the Civil Damage Act, or other laws of the State of New York or of the United States, applicable to the use, gift or sale of intoxicating liquors upon the demised premises by tenant or any assignee or sub-tenant; or arising by reason of any alleged injury to persons or property which may be caused, or alleged to have been caused by or attributable to the neglect, carelessness, or improper conduct of tenant, his agents, employees, guests, assignees, or sub-tenants at the demised premises, or arising from the use and occupation thereof by virtue of this lease; or by reason of the breach of any rules, ordinances, or regulations of the Police, Building, Fire, Tenement House, or other Municipal [fol. 15] Departments of the City of New York, or of any department of the State of New York, affecting said premises, during the term of this lease, and tenant agrees to reimburse landlord for the reasonable cost and disbursements incurred by landlord in defending any and all suits that may be brought against landlord upon any such claim or claims; and will satisfy, pay and discharge any and all judgments that may be recovered against landlord in any such suit or suits.

It is covenanted and agreed that neither this lease, nor the term hereby demised, nor any part thereof, nor any right hereby vested in the tenant shall at any time be as-

signed or transferred in any manner whatsoever, unless the tenant shall deliver or cause to be delivered to the landlord an agreement in writing in and by which the assignee or transferee shall be obliged fully to perform all the terms, covenants, conditions and provisions of this lease. No assignment or transfer shall be valid for any purpose whatever until a duplicate original of such an agreement has been delivered to the landlord. No assignment or transfer shall in any manner whatsoever operate to relieve or release the tenant or any other person or corporation from any obligation hereunder.

It is further understood and agreed that if Mr. Oliver A. Olson and Mr. Walter W. McNeil shall give up the active management of the tenant's business, or if they shall have sold or transferred a majority of the shares of the capital stock of tenant, Landlord may require, in the event of either of said contingencies arising, that there shall be paid to him as security for the full and faithful performance of each and every one of the terms, covenants and [fol. 16] conditions of this lease by the tenant herein, a sum equal to three (3) months' rent then being paid currently. Tenant covenants and agrees that upon the happening of either of said contingencies, it will immediately give notice thereof to Landlord. In the event that either of the contingencies aforesaid shall have occurred, Landlord shall give notice in writing to Tenant that he demands the payment of the said sum to him as security and if the said sum shall not have been so paid to Landlord within thirty (30) Days after the giving of such notice, it is understood and agreed that the failure so to do shall constitute a default hereunder and thereupon Landlord or his agents may thereafter give notice in writing to Tenant that this lease and the term hereby granted shall be terminated on a day to be specified in such second notice, which shall not be less than thirty (30) days after the same shall have been given, and in any such event the term and estate hereby vested in the Tenant and any and all rights of the Tenant hereunder shall upon the day specified in said second notice, immediately cease and expire as fully as if the entire period herein provided for had elapsed and thereupon it shall and may be lawful for Landlord into the said demised premises to re-enter and repossess, hold and enjoy the same again as of his former estate and interest therein,

and remove all persons therefrom by summary proceedings or otherwise, anything herein contained to the contrary in anywise notwithstanding. The provisions of this paragraph are a limitation of the term of this lease. It is further understood and agreed that Landlord may require the payment of said sum to him as security as one of the conditions to the granting of consent to the assignment of this lease.

[fol. 17] It is further understood and agreed that if said security has been paid to Landlord and if no recourse to it shall be claimed by Landlord and if the Tenant shall not be in default in the performance of any of the terms, covenants, conditions and provisions of this lease, the Landlord shall at the expiration of the full term hereof, to wit: September 30, 1937, pay the said sum to the tenant. If said security or any part theerof shall be applied by the Landlord for the purpose of making good any default hereunder, the amount so applied on demand of the Landlord shall immediately be made good by the Tenant so that at all times until the expiration of the full term of this lease Tenant shall maintain unimpaired in the hands of Landord a sum equal to the amount originally deposited. Landlord shall pay to the Tenant interest on said sum or so much thereof as from time to time shall remain unapplied at the rate of three (3) per centum per annum, and said interest shall be paid by Landlord to tenant at the end of each calendar year of the term.

Provided always, nevertheless, that if default be made by the Tenant in the performanec of any covenant herein, except the covenant for the payment of rent or additional rent, or in the covenants of any other lease between the Landlord and Tenant, the Landlord, upon the happening of any such events, may give to the Tenant five days' notice of intention to end the term of this lease or any other lease between the Landlord and Tenant, and thereupon, at the expiration of said five days, the term of this lease and any and all other leases affecting the same Landlord and Tenant shall expire as fully and completely as if that day were the date herein or therein definitely fixed for the ex-

[fol. 18] piration of the term, and the Tenant will then quit and surrender to the Landlord the demised premises mentioned in this or any such lease; but the Tenant shall remain liable as herein provided, except that if the demised

premises be destroyed by fire or other casualty the foregoing provision shall not affect any other lease between the same Landlord and Tenant; or, if the Tenant make default in the payment of the rent reserved hereunder, or any part thereof, or in making any other payment herein provided for, or if the notice last above provided for shall have been given and said five days' period shall have elapsed, or if the Tenant abandon said premises, if said premises become vacant, if the Tenant becomes insolvent, if the Tenant make an assignment for the benefit of creditors, if bankruptcy proceedings be instituted by or against the Tenant, if a Receiver or Trustee of the Tenant's property be appointed, or if any similar event happen in respect to any other lease between the Landlord and the Tenant, then it shall be lawful for the Landlord, or the Landlord's agent, without notice, to re-enter said premises and every part thereof, either by ejectment, summary proceedings, personal entry. or otherwise, and remove all persons and property therefrom without being liable to indictment, prosecution, or damages therefor, and in the event of such re-entry or the cessation or cancellation of such estate, lease, renewal or extension, the Tenant, for the Tenant and for all persons claiming through or under the Tenant, hereby waives any and all right to redemption now or hereafter given by any law. The Landlord may, after obtaining possession of said premises, re-let the same or any part thereof as the agent of the Tenant for the whole or any part [fol. 19] of the term herein demised, from time to time, as the Landlord may deem best. In the event that the Landlord shall obtain possession by re-entry, dispossess, summary proceedings or otherwise, the Tenant hereby agrees to pay to the Landlord on demand the expense incurred by the Landlord in obtaining possession of said premises, including legal expenses and attorneys' fees, and to pay such other expenses as the Landlord may incur in putting the premises in good order and condition, and also any other expense or commissions which may be paid by the Landlord in and about the letting of the same. The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term

herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder. The Landlord may sue for and enforce the collection by law of such amount as above provided for which may be due at the expiration of each month, and the Tenant expressly agrees that any such suit shall not be a bar to or prejudice in any way the rights of the Landlord to enforce [fol. 20] the collection of the amount due at the end of any other future month by a like or similar proceeding. If said Tenant shall, at the date of the execution of this lease, be in possession of said premises under an existing lease, it is agreed that if the said lease under which said Tenant holds said premises shall for any cause be cancelled before its date of expiration, then this lease shall likewise, at the option of the Landlord, be void and of no effect.

And it is further covenanted and agreed that at 10 A. M. on the last day of the said term, or other sooner termination of the estate hereby granted, the Tenant shall and will peaceably and quietly leave, surrender and yield up unto the Landlord the said premises, and every part thereof, in as good a state and condition as they were in at the commencement of the said term, reasonable use and wear thereof; damages by fire, and the leakage of the roof, excepted.

Tenant shall furnish a water meter to measure consumption at the premises at his expense and keep the same in repair during the term.

If the nature of tenant's business causes an increase over existing fire insurance rate, increase of premium shall be paid by tenant as additional rent; Tenant also waives the right to more than one trial in any ejectment proceeding and it is understood that landlord makes no warranty of safety or suitability.

It is further covenanted and agreed that the tenant shall have the right, at the tenant's own cost and expense, to build an inside stairway connecting the store and parlor

floors of said building, such work to be done in accordance with the rules and regulations of all Departments having jurisdiction.

[fol. 21] The tenant furthermore covenants and agrees to use the tenant's own stairway as the means of communication between the store and parlor floors and shall use the present parlor floor entrances into the main hallway principally as fire emergency exits.

And landlord covenants and agrees that tenant on paying the rent herein reserved and performing all the conditions and covenants aforesaid shall and may peaceably and quietly have, hold, and enjoy the demised premises for the term aforesaid.

The provisions hereof shall apply to bind and enure to the benefit of the heirs, representatives, successors and assigns of the parties, provided, however, that no assignment by or through the tenant in violation of the provisions herein contained shall vest any right in the assignee thereunder, and that no assignment shall relieve the tenant from liability of any of the terms and agreements herein.

In Witness Whereof, the parties hereto have executed this instrument the day and year first above written.

W. Stafford Reid. Oliver A. Olson Company, Inc., by Oliver A. Olson, President. (L. S.)

In the presence of Norman C. Miller.

[fol. 22] State of New York,
County of New York, ss:

On this 21st day of December, 1927, before me personally came Oliver A. Olson, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is the President of Oliver A. Olson Company, Inc., the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporaion, and that he signed his name thereto by like order.

Emily Krauss.

State of New York,
County of New York, ss:

On this 22nd day of December, 1927, before me personally came W. Stafford Reid, to me known and known to me to

be the individual described in and who executed the within instrument and he duly acknowledged that he executed the same.

Henry Leifheit, Notary Public. Queens County No. 993. Kings Co. Clerk No. 103; Reg. No. 8125. N. Y. Co. Clerk No. 108; Reg. No. 8201. Term expires Mar. 30, 1928.

[fol. 23] For Value Received, the undersigned hereby assigns, transfers and conveys the within lease to Emily Krauss, residing at 159 East 92nd Street, New York City.

W. Stafford Reid. (L. S.)

[fol. 24] In United States District Court

[Title omitted]

Notice of Hearing Before Referee

Sirs: Please take notice that a hearing will be held on the claim filed herein by Manhattan Properties, Inc., before Hon. Peter B. Olney, Jr., Referee, at his office at No. 19 Rector Street, in the Borough of Manhattan, City of New York, on the 16th day of November, 1932, at 10:30 o'clock in the forenoon of said day.

Dated November 10th, 1932.

Yours, etc., Arnstein & Levy, Attorneys for Manhattan Properties, Inc. Office & P. O. address: 295 Fifth Avenue, Borough of Manhattan, City of New York.

To Irving Trust Company, Trustee in Bankruptcy, One Wall Street, Borough of Manhattan, City of New York; Kaye, McDavitt & Scholer, Esqs., Attorneys for the Trustee, 149 Broadway, Borough of Manhattan, City of New York.

[fol. 25] In United States District Court

[Title omitted]

Order of Referee, Dated January 30, 1933

Manhattan Properties, Inc., having filed its claim in this proceeding in the principal sum of $26,558.93, consisting in

part of a claim for damages in the sum of $25,000 for breach of a lease between the claimant as landlord and the bankrupt as tenant, and the claimant having moved this court for permission to liquidate the same claim in so far as it seeks to recover damages as aforesaid, and said motion having duly come on to be heard on the 24th day of January, 1933, and Arnstein & Levy, Esqs., attorneys for Manhattan Properties Inc., having appeared in support thereof, and Kaye McDavitt & Scholer, Esqs., having appeared in opposition thereto, and it appearing from the fact of said claim that the claim for damages is for anticipatory breach of a lease of real property,

Now, on motion of Kaye, McDavitt & Scholer, attorneys for the Trustee, it is

Ordered that the application of said Manhattan Properties, Inc. for leave to liquidate its said claim be and the same hereby is denied, and it is further

[fol. 26] Ordered that so much of the said claim as seeks damages in the sum of $25,000 be and it hereby is expunged and disallowed; and it is further

Ordered that the said claim be and it hereby s reduced to and allowed in the sum of $1,558.93 without prejudice to any proceeding to reconsider the said claim which may be brought by the Trustee herein as and when the Trustee may be so advised.

Dated New York, January 30, 1933.

Peter B. Olney, Jr., Referee in Bankruptcy.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO REVIEW

To Hon. Peter B. Olney, Jr., Referee in Bankruptcy:

Your petitioner respectfully shows:

1. That it is a creditor of Oliver A. Olson Co. Inc., the above named bankrupt, and that its claim has been duly filed herein.

2. That in the course of the proceedings, on the 30th day of January, 1933, an order, a copy of which is hereto annexed, was made and entered herein and a copy thereof with notice of entry was mailed to Arnstein & Levy, attorneys for your petitioner, on February 4, 1933, and received by said attorneys on February 6, 1933.

3. That said order was and is erroneous in so far as it denied the application of your petitioner for leave to liquidate its claim and in so far as it expunged and disallowed so much of the said claim as seeks to recover the sum of $25,000.

4. Your petitioner respectfully excepts to the Referee's order in the foregoing connection and respectfully submits [fol. 28] that the Referee erred in making the same by reason of the fact that your petitioner's application for leave to liquidate the same should have been granted.

5. The action of the Referee is contrary to the law and is not based on the evidence.

6. The Referee erred in denying the application of your petitioner for leave to liquidate its claim.

7. The said Referee erred in expunging and disallowing so much of the claim as seeks to recover the sum of $25,000.

Wherefore your petitioner, aggrieved because of such order prays that the same be reviewed as provided in the Bankruptcy Act of 1898 and the amendment thereto and as provided in General Order XXVII.

Dated New York, February 14, 1933.

Manhattan Properties, Inc., Petitioner by Theodore Backer, President.

[fol. 29] *Duly sworn to by Theodore Backer. Jurat omitted in printing.*

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF REFEREE

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I, Peter B. Olney, Jr., Referee in charge of the above entitled matter, do hereby certify, pursuant to General Order XXVII as follows:

The question certified for review is whether I erred in making the order dated January 30, 1933, sought to be reviewed, in and by which I denied the application of petitioner for review to liquidate an alleged claim for damages for breach of a lease. The damages sought to be proved represent the difference between the aggregate rent reserved in a lease expiring in 1937 and the alleged present rental value of the premises. I denied the motion on the ground that said alleged damages could not be proved in bankruptcy under the decision of Judge Knox re Schulte United, Inc. in Bankruptcy No. 50355 handed down May 21, 1932.

There is submitted herewith proof of claim of petitioner for review, petition for review verified February 14, 1933, and the stenographic minutes of the proceedings before me [fol. 31] on said motion. No separate memorandum was made by me in deciding this motion.

Dated New York, February 16th, 1933.

Respectfully submitted.

Peter B. Olney, Jr., Referee.

Hearing on the above will be on the bankruptcy motion calendar in the District Court on Thursday, February 23, 1933.

Peter B. Olney, Jr., Referee.

Mr. Fierman: The next is the claim of the Manhattan Properties.

(Claimant represented by Ornstein & Levy, attorneys, by Mr. Levinson, of counsel.)

Mr. Fierman: The trustee admits there is back rent which is due of $1,558.93. The balance of the claim is for future rent which they call damages. They compute their damages at $25,000.

The Referee: How do you get away from Judge Knox's Schulte-United case?

Mr. Levinson: The lease in this case contains the provision if bankruptcy proceedings be executed by or against the tenant then it shall be lawful for the landlord or the landlord's agent to re-enter such premises, et cetera. We say under a fair construction of that lease there became an

anticipatory breach of the lease and we are not asking for [fol. 32] rent at all, we are asking for damages. I do not think the Schulte-United case applies to this case. There is one case similar, and that is the Roth & Apfel case, which is easily distinguishable from our case, I believe.

The Referee: Insofar as this claim is based upon damages by reason of the breach of the covenant of the lease, being the difference between the rental value of the premises and the rent reserved in the lease; it is, in my opinion, not provable in bankruptcy, under the decision of Judge Knox in Schulte-United, Inc., Bankruptcy No. 50,355, handed down May 21st, 1932 and, therefore, the application to liquidate the claim in that respect must be denied and the claim allowed merely for the amount of indebtedness which was actually owing at the time of the filing of the petition, which is $1,558.93.

Mr. Levinson: Of course I reserve my right to prove my claim if it is later legally found I have a right to do so.

The Referee: Of course.

Mr. Levinson: I will take an exception, your Honor.

The Referee: All right, you may enter an order.

Peter B. Olney, Jr., Referee.

[fol. 33] In United States District Court, Southern New York

Present: Hon. Alfred E. Coxe, D. J.

In the Matter of Oliver A. Olson Co., Inc., Bankrupt

Order Appealed From—March 15, 1933

Manhattan Properties, Inc., having filed its claim in this proceeding, and having thereafter moved before the Honorable Referee for an order liquidating so much of its said claim as requests damages in the sum of Twenty-five thousand ($25,000) dollars for breach of a lease of real property between the claimant as landlord, and the bankrupt as tenant, and the said referee having expunged that part of the claim which claimant sought to have liquidated on the ground that the said claim for damages was contingent and could not be proved against the bankrupt estate:

And the said claimant having petitioned this court to review the said order of the referee which expunged and struck out so much of the claim of the said petition as requested damages as aforesaid, and the said referee having certified the question for review to this court pursuant [fol. 34] to General Order XXVII, and motion having been brought thereon before this court on the 8th day of March, 1933.

Now, on reading the duly verified claim of Manhattan Properties, Inc., and the exhibits thereto annexed and made a part thereof, and the order of the referee herein dated January 30, 1933, and the duly verified petition to review the said order, and the certificate of the referee dated February 16, 1933, and after hearing Arnstein & Levy, attorneys for the said petitioner, for the motion and Kaye, McDavitt & Scholer, attorneys for the Trustee, in opposition thereto, and due deliberation having been had thereon, and on filing a memorandum of the court, it is

Ordered that the order of Honorable Peter B. Olney, Jr., Referee in Bankruptcy, be and it hereby is in all respects confirmed.

Alfred E. Coxe, U. S. D. J.

[fol. 35] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the undersigned hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order entered in the office of the Clerk of the United States District Court for the Southern District of New York on March 15, 1933, confirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, and from each and every part of said order.

Dated March 27, 1933.

Yours, etc., Manhattan Properties, Inc., Petitioner, by Arnstein & Levy, Attorneys for Petitioner. Office & P. O. address: 295 Fifth Avenue, Borough of Manhattan, City of New York.

To Kaye, McDavitt & Scholer, Esqs., Attorneys for Trustee, 149 Broadway, Borough of Manhattan, City of New York.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

Manhattan Properties, Inc., feeling itself aggrieved by the order entered in the above entitled proceeding in the office of the Clerk of this Court on the 15th day of March, 1933, confirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, expunging and disallowing that part of the claim amounting to $25,000 for breach of a lease of real property between petitioner as landlord and the bankrupt as tenant and denying petitioner's application for leave to liquidate its claim for damages, does hereby appeal from said order and from each and every part thereof to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the Assignment of Error, which is filed herewith, and prays for an order allowing the said petitioner to prosecute said appeal and that a transcript of the record and proceedings on which said order is made may be duly authenticated and sent to the United States Circuit Court of Appeals, for the Second Circuit, and that a citation be issued directed to the Irving Trust Company, as Trustee in Bankruptcy of the estate of the above named bankrupt commanding it to appear before the United States Circuit Court of Appeals, for the Second [fol. 37] Circuit, to do and receive what may appertain in justice to be done in the premises.

Dated March 28, 1933.

Manhattan Properties, Inc., Petitioner, by Arnstein & Levy, Attorneys for Petitioner. Office & P. O. address: 295 Fifth Avenue, Manhattan, New York City.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The forgoing appeal from the order entered herein on March 15, 1933 be and the same hereby is allowed.

Dated March 29th, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Manhattan Properties, Inc., feeling itself aggrieved by the order entered herein on March 15, 1933 now appears by its attorneys and presents with its notice of appeal the following assignments of error:

1. That the Court erred in confirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated January 30, 1933, denying petitioner's motion to liquidate its claim for damages for breach of a lease.

2. That said order was and is erroneous insofar as it confirmed the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, denying the application of the petitioner for leave to liquidate its claim and expunging and disallowing so much of the claim as seeks to recover the sum of $25,000.

3. That said order was and is erroneous in that it was and is contrary to the law and is not based on the evidence.

Wherefore, petitioner prays that the said order be reversed and that the District Court of the United States, [fol. 39] for the Southern District of New York be directed to enter an order reversing its order and reversing the decision of the Referee and allowing the claim of the petitioner and directing liquidation of the same.

Dated March 27, 1933.

Manhattan Properties, Inc., Petitioner, by Arnstein & Levy, Attorneys for Petitioner. Office & P. O. address: 295 Fifth Avenue, Manhattan, New York City.

[fol. 40] Citation, in usual form, omitted in printing.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated April —, 1933.

Arnstein & Levy, Attorneys for Appellant. Kaye, McDavitt & Scholer, Attorneys for Appellee.

[fol. 42] Clerk's certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 465

Argued June 9, 1933. Decided July 17, 1933

MANHATTAN PROPERTIES, INC., Appellant,

v.

IRVING TRUST COMPANY, Trustee, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeal by a creditor from an order in bankruptcy of the District Court for the Southern District of New York expunging its claim against the trustee.

Maurice J. Bricker, for appellant.
Harold L. Fierman, of New York City, for appellee.

L. HAND, Circuit Judge:

This case involves the validity of a claim in bankruptcy by a lessor against a bankrupt estate for rent due after petition filed. The referee and judge expunged the claim and the lessor appealed. The bankrupt, a corporation, had leased from the creditor premises in New York in which its business was carried on. The lease provided that upon default in any covenant, including the payment of rent, the lessor might re-enter and repossess himself of the premises, in which case the lessee promised "to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord." Upon the bankruptcy, one of the conditions of re-entry, the lessor re-entered and filed a claim for the difference between the aggregate installments of future rent and the present value of the balance

of the term. The claim was expunged on the authority of our decision in Re Roth & Appel, 181 F. 667, 31 L. R. A. (N. S.) 270, which the appeal is an effort to induce us to overrule.

The Bankruptcy Act of 1841 (5 Stat. 440, 444) allowed proof of contingent claims, section 5, and in Bosler v. Kuhn, 8 Watts & S. (Pa.) 183, the question came up of whether future installments of a ground-rent were provable. The Supreme Court of Pennsylvania held that they were not, since the land was the debtor, and the liability could not be regarded as an annuity, which was one of the claims expressly provided for by the act. In Savory v. Stocking, 4 Cush. (Mass.) 607, the claim was not allowed because future rent was not a debt in existence upon petition filed. In both cases apparently there had been no covenant to pay rent. The Act of 1867 (14 Stat. 517) also provided for contingent claims, but expressly dealt with rent, Rev. St. § 5071, and this, coupled with Rev. St. § 5072, was held to bar future rents in Bailey v. Loeb, Fed. Cas. No. 739, 11 N. B. R. 271, and In re May, Fed. Cas. No. 9,325, 9 N. B. R. 419. Independently of these sections (section 19 of the Act), Judge Lowell held in Ex parte Houghton, Fed. Cas. No. 6,725, 1 Lowell 554, that future rent was not provable, because it was not a present debt, though the lease contained a covenant to pay it. This he followed in Ex parte Lake, Fed. Cas. No. 7,991, 2 Lowell 544, in a case where the lessee had in addition covenanted to indemnify the lessor seriatim in case of re-entry for breach of condition. Ex parte Houghton may be explained on the theory that rent ceased on re-entry—the lessor having re-entered—but Ex parte Lake must stand for a ruling that future rents are not provable, though the reason is not clear, except perhaps on historical grounds. When the situation came before us in Re Roth & Appel, 181 F. 667, 31 L. R. A. (N. S.) 270, under a lease like that at bar, we disallowed the claim. The ground for our action was that section 63 (a) (4), 11 U. S. C. A., § 103 (a) (4), incorporated the phrase, "absolutely owing," of section 63 (a) (1), 11 U. S. C. A., § 103 (a) (1), and that the claim was contingent because, upon petition filed, it was uncertain whether the lessor would re-enter at all, and again, whether if he did, there would be any loss, and, if so, how much. Our interpretation of section 63 (a) (4) has now been ex-

pressly overruled in Maynard v. Elliott, 283 U. S. 273, 51 S. Ct. 390, 75 L. Ed. 1028, and our decision must rest upon the ground that, though the contingency of the claim is no objection to its proof, it is practically too uncertain to be liquidated. That had been held, for instance, in Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232, under the Act of 1867, and, in Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084, under that of 1898. In Wolf v. Stix, 99 U. S. 1, 25 L. Ed. 309, the amount was fixed and the uncertainty of the incidence was not thought too great; in Maynard v. Elliott, both were held certain enough. Obviously, in these respects each case must stand by itself.

The law, as we now understand it, is therefore that a contingent claim may in general be proved, provided its liquidation does not involve too speculative considerations, confessedly a variable standard. Among these will be the ability of the claimant himself to control the contingency. Moreover, the whole subject has taken on a new aspect from Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, where bankruptcy was held to be the anticipatory breach of a contract to pay annually for a cab privilege which the grantor might revoke. The uncertainties attendant upon any future installments were as great as in the case of a covenant to pay rent under a lease. Moreover, in Maynard v. Elliott, though the maker of the note in fact became insolvent before petition filed, and thus the liability of the indorser might have then been calculated, this was not mentioned, or even alluded to, in the opinion. Perhaps it was assumed that his default would certainly be decided before the bankrupt estate was fully administered, and that liquidation could thus take place in time for distribution. Indeed, it would otherwise be hard to find an instance in which the amount of the claim could be more uncertain. In Moch v. Market Street National Bank, 107 F. 897 (C. C. A. 3), and in Re Semmer Glass Co., 135 F. 77 (C. C. A. 2), it appears to have been assumed that the solvency of the maker would be determined in season. When that is so, no practical difficulty arises. But, in Re Merrill & Baker, 186 F. 312 (C. C. A. 2), there appears to have been no obstacle to such a liquidation of the claim, and no reason to take a different view from In re Semmer Glass Co., though we did. Again in Re Mullings Clothing Co., 238 F. 58, L. R. A. 1918A, 539 (C. C. A. 2), we allowed a claim for future rent

in a situation like In re Roth & Appel, except that the bankrupt had repudiated a contract to accept a lease before petition filed. This did indeed avoid the objection that the claim was contingent in form, but the uncertainty as to its amount, or indeed whether there would be any loss at all, was quite the same. Finally in Re Marshall's Garage, 63 F. (2d) 759 (C. C. A. 2), we accepted the present valuation of land as a permissible subtrahend for calculating damages on a breach of contract to buy five years later. The uncertainty as to the future value of a fee is no less great than as to the value of sequent terms. In that case we observed that it is the practice in cases of anticipatory breach, when the trial comes on before the period of performance has arrived, to forecast its value by the best means at hand. Cf. N. Y. Trust Co. v. Island Oil & T. Co., 34 F. (2d) 653, 654 (C. C. A. 2). And in bankruptcy, if an employer makes anticipatory breach of a future contract, the employee's earning power may be calculated in spite of the uncertainty as to its amount, or as to his continued life and health. In re Schultz & Guthrie (D. C.), 235 F. 907. The same is true of commercial contracts. In re Stern, 116 F. 604 (C. C. A. 2). See, too, In re Portage Rubber Co., 296 F. 289 (C. C. A. 6), although the court did not notice the full scope of its ruling.

On the other hand, the doctrine in Re Roth & Appel, supra (C. C. A.) 181 F. 667, 31 L. R. A. (N. S.) 270, is the law in five other circuits, Slocum v. Soliday, 183 F. 410 (C. C. A. 1); McDonnell v. Woods, 298 F. 434, 437 (C. C. A. 1); Trust Co. of Ga. v. Whitehall Holding Co., 53 F. (2d) 635 (C. C. A. 5); Atkins v. Wilcox, 105 F. 595, 53 L. R. A. 118 (C. C. A. 5); Wells v. Twenty-first St. Realty Co., 12 F. (2d) 237 (C. C. A. 6); Britton v. Western Iowa Co., 9 F. (2d) 488, 489, 45 A. L. R. 711 (C. C. A. 8); Watson v. Merrill, 136 F. 359, 69 L. R. A. 719 (C. C. A. 8); Colman Co. v. Withoft, 195 F. 250 (C. C. A. 9). The rule in the Third and Seventh circuits is otherwise. In re Keith-Gara Co. (D. C.) 203 F. 585, affirmed 213 F. 450 (C. C. A. 3); In re Chakos, 24 F. (2d) 482 (C. C. A. 7). Furthermore the Supreme Court gave apparent approval to In re Roth & Appel, supra (C. C. A.) 181 F. 667, 31 L. R. A. (N. S.) 270, in Central Trust Co. v. Chicago Auditorium, supra, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, and Filene's Sons Co. v. Weed, 245 U. S. 597, 38 S. Ct. 211, 62 L. Ed.

497, and to Atkins v. Wilcox, supra (C. C. A.) 105 F. 595, 53 L. R. A. 118, in Maynard v. Elliott, supra, 283 U. S. 273, 51 S. Ct. 390, 75 L. Ed. 1028. Again, whatever may be said of the consistency of the ruling, In re Mullings Clothing Co., supra (C. C. A.) 238 F. 58, L. R. A. 1918A, 539, professed to leave the doctrine untouched, as did In re Marshall's Garage, supra (C. C. A.) 63 F. (2d) 759, 762. Finally, although the Bankruptcy Act has been since twice amended, Congress has made no change in this feature. Indeed as we shall show, it changed the law in this precise respect in one situation, but did not do so in this. For these reasons my brothers believe that it has become the settled law of this circuit and that we should adhere to it. For myself, while I recognize the force of this application of stare decisis, it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think that we should make the necessary adjustments. Certainly I have no more compunction in assessing the future value of realty, than that of chattels. The periods involved are indeed apt to be longer, but the fluctuations are less rapid. Some chances must be taken, but that is often so.

There remains only the question whether the Act of March 3, 1933 (11 U. S. C. A. § 201 et seq.), has made a change in the law, assuming without deciding that it applies to pending proceedings. The sentence concluding section 74 (a), 11 U. S. C. A. § 202 (a), standing alone, would be enough to justify the proof of such claims, but the section itself is of very limited scope. It applies only to individuals, and occurs in a statute providing only for compositions and moratoriums. The sole color for saying that it should not be confined by its association is that it is redundant, because both "debts" and "creditors" are already so defined as to include claims "for future rent." Literally indeed, in each case the definition extends only to moratoriums, not to compositions, and it is just conceivable that this may give the concluding sentence a function. Congress might have feared the omission, and provided against it out of abundant caution. We rely, however, upon the fact that, as it stands, it is in a context limited as we have said; if the purpose was to give general provability to such claims, we cannot conceive that it would have been tucked in at the end of such a section. Its origin appears from the

debates. It was introduced on the floor of the Senate, apparently only for caution. Objection was made by the chairman of the steering committee on the ground that no change was contemplated in the existing act. Upon this the proposer withdrew it temporarily, assenting to the chairman's declared purpose. Why it was again introduced and then accepted does not appear, but the claimant asks us to suppose that it must have been because of a change in intent which then countenanced amendments to the general act. This is a most tenuous inference; it is by far more likely that it was to lay any possible doubts, its original purpose. At any rate, if the intent was broader, the language has too well concealed it; and we hold the sentence does not cover the situation at bar.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of OLIVER A. OLSON CO., INC., Bankrupt; MANHATTAN PROPERTIES, INC., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Oliver A. Olson Co., Inc. Order for

mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 47, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of In the Matter of Oliver A. Olson Co., Inc., Bankrupt; Manhattan Properties, Inc., Appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of September, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 50] SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed November 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,108. U. S. Circuit Court of Appeals, Second Circuit. Term No. 505. Manhattan Properties, Inc., petitioner, vs. Irving Trust Company, as trustee in bankruptcy of Oliver A. Olsen Co., Inc. Petition for a writ of certiorari and exhibit thereto. Filed October 5, 1933. No. 505, O. T., 1933.

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